IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1590

GROVER JONES, JR., *Appellant*,

v.

THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

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The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that the appeal has not been taken in time, the appeal is not within the jurisdiction of this Court because not taken in conformity to statute, and the question presented is so unsubstantial as not to need further argument.

I. THE PROCEEDINGS BELOW

These proceedings were instituted by The Committee on Legal Ethics of The West Virginia State Bar pursuant

to the provisions of Article VI of the By-Laws of The West Virginia State Bar for the disbarment of the appellant. The appellant was charged with the unauthorized misappropriation and conversion of $22,700.00 entrusted to him in his fiduciary capacity as executor and trustee under the will of W. B. Hamby. The complaint charged the appellant with six violations of the Code of Professional Responsibility as adopted by the Supreme Court of Appeals of West Virginia.

After hearing on November 22, 1977, the Supreme Court of Appeals annulled and revoked the license of the appellant to practice law in the State of West Virginia for the reasons set forth in its opinion per curiam of the same date. The appellant applied for a rehearing. On February 6, 1978, the Court granted a hearing limited to reconsideration of the penalty imposed and the amount of costs awarded against the appellant. After rehearing and reargument, by its order entered on January 18, 1979, the Court found that the appellant's misconduct was such as to warrant the annulment of appellant's license to practice law and that the opinion per curiam announced on November 22, 1977, was justified and correct. The Court modified its former order only to the extent that the former order required the appellant to reimburse The Committee on Legal Ethics for legal fees incurred by it in the disbarment proceedings.

The rehearing and reargument before the Court were limited to a consideration of the severity of the penalty imposed, namely, disbarment, and the costs awarded against the appellant. The merits of the case and the other issues raised and determined by the Court's opinion per curiam were not reargued and were not reconsidered by the Court.

II. JURISDICTION OF THE COURT TO HEAR THIS CASE ON APPEAL UNDER 28 U.S.C. 1257(2)

Appellant in his jurisdictional statement has not attacked the validity of any statute of the State of West Virginia. The appellant does not assert that West Virginia Code §51-1-4a, the integrated bar statute, or Sections 1 through 22, inclusive, Article VI of the By-Laws of The West Virginia State Bar, are repugnant to the Fourteenth Amendment of the Constitution of the United States. Rather, the appellant asserts he was denied due process under the Fourteenth Amendment because.

> . . . the subcommittee had prejudged the cause; had determined that appellant was guilty before the hearing was closed; were contemptuous in their references to positions taken by both appellant and his attorneys; and were merely going through the formality of holding a hearing without being prepared to base a fair and reasoned decision upon the evidence adduced at the hearing. [Jurisdictional Statement, p. 14]

The appellant's position is stated at page 18 of the jurisdictional statement where it is charged:

> . . . The decision of the Supreme Court of Appeals ignores the evidence herein and authorizes the appellee to conduct its disbarment proceedings in utter disregard of the Constitution of the United States.

The appellant's assignment of error in this Court does not go to the validity of the statute or of any by-law of The West Virginia State Bar. On the contrary, the charge is of an unconstitutional exercise of authority by The Committee on Legal Ethics. Even where the federal question has been properly raised in the state court, an

appeal under 28 U.S.C. §1257(2) may be dismissed where the appellant fails to attack a statute explicitly in his jurisdictional statement. *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 185, 89 L.Ed. 857, 65 S.Ct. 624(1944); *Cady* v. *Georgia*, 323 U.S. 676, 89 L.Ed. 549, 65 S.Ct. 190 (1944); *Seaboard Airline R. Co.* v. *Watson*, 287 U.S. 86, 77 L.Ed. 180, 184, 53 S.Ct. 32 (1932); *Flournoy* v. *Wiener*, 321 U.S. 253, 88 L.Ed. 708, 64 S.Ct. 548 (1944). In *Flournoy* v. *Wiener*, this Court stated:

> It is a familiar rule, consistently followed, that upon appeal from a state court this court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon even through properly presented to and passed upon by the state court. 321 U.S. at 259.

and in *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 89 L.Ed. 857, 65 S.Ct. (1944), Mr. Chief Justice Stone, writing for the majority, stated:

> Even where the federal question has been properly raised below, an appeal under §237(a) may be dismissed where appellants fail to attack a statute explicitly in their assignments of error here. 324 U.S. at 187.

The appellant has failed to attack explicitly the validity of any statute by reason of its repugnancy to the Constitution of the United States.

Certiorari is the proper method of reviewing the alleged unconstitutional exercise of authority by The Committee on Legal Ethics. *Zucht* v. *King*, 260 U.S. 174, 67 L.Ed. 194, 43 S.Ct. 24 (1922); *Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256, 64 L.Ed. 255, 40 S.Ct. 133 (1919).

Withrow v. *Larkin*, 421 U.S. 45, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975), cited by the appellant as sustaining the jurisdiction of this Court to review the judgment of the Supreme Court of Appeals of West Virginia on direct appeal under 28 U.S.C. §1257(2) did not involve an appeal from the judgment of a state court. On the contrary, *Withrow* v. *Larkin* was an appeal from a three judge district court.

III. THE APPEAL WAS NOT TIMELY

By its order entered on the 22nd day of November, 1977, the Supreme Court of Appeals of West Virginia annulled and revoked the license and authority of the appellant to practice law in the State of West Virginia for the reasons set forth in its opinion per curiam of the same date. On February 6, 1978, the Court granted a rehearing limited to a reconsideration of the penalty imposed and the amount of costs awarded against the appellant. By order entered on January 18, 1979, the Court found that the appellant's misconduct was such as to warrant the annulment of appellant's license to practice law in the State of West Virginia and that the opinion per curiam announced on November 22, 1977, was justified and correct. The Court modified its former order only to the extent that the former order required the appellant to reimburse The Committee on Legal Ethics for legal fees incurred by it in the disbarment proceedings.

The decision of the Supreme Court of Appeals of West Virginia with respect to any federal question became final no later than February 6, 1978, when the Court granted the appellant a rehearing limited to a reconsideration of the penalty imposed, disbarment, and the

amount of costs awarded against the appellant. The granting of a rehearing thus limited was in effect a denial of a rehearing as to all other issues in the case including any federal question raised therein.

Rule 13(1) of this Court provides that an appeal shall be docketed within ninety (90) days after the entry of the judgment appealed from. This appeal was docketed on April 18, 1979. The order of the Supreme Court of Appeals granting a limited rehearing and in effect denying a rehearing on the merits was entered on February 6, 1978.

The appellee submits that the appeal was not timely docketed as required by Rule 13(1).

IV. THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The multiple functions accorded to and exercised by The Committee on Legal Ethics by virtue of Article VI of the By-Laws of The West Virginia State Bar, as approved by the Supreme Court of Appeals of West Virginia, do not violate the fundaments of due process required by the Constitution of the United States. While the right to practice law is indeed a valuable special privilege, and while any proceeding to deprive a lawyer of that privilege is subject to procedural due process, *In Re Ruffalo,* 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968), the requisites of procedural due process in this context must necessarily be delineated by the fact that disciplinary proceedings against lawyers are ". . . neither civil actions nor criminal prosecutions but . . . are special proceedings which are peculiar in their nature." *Committee on Legal Ethics of The West Virginia State Bar* v. *Graziani,* 200 S.E.2d 353 (W.Va. 1973), cert. den'd., 416 U.S. 995, 94 S.Ct. 2410, 40 L.Ed.2d 474 (1974); *Committee on Legal Ethics of The West Virginia State Bar* v. *Pence,* 240 S.E.2d 668 (W.Va. 1977).

The appellant contends that the procedures utilized by the Committee in initiating, investigating, and prosecuting complaints violate the due process clause of the Fourteenth Amendment. As pointed out by the Supreme Court of Appeals of West Virginia in its opinion of November 22, 1977, The Committee on Legal Ethics has no adjudicatory function in disbarment proceedings. This function is exercised solely by the Supreme Court of Appeals. In its opinion (see Jurisdictional Statement, p. A-6) the Supreme Court of Appeals said of the Committee's functions:

> Counsel for the subcommittee is in charge of investigation and preparing the case against the respondent; the subcommittee acts as fact finder; the role of adjudicator reposes with this Court.

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk in administrative adjudications has been considered and rejected by this Court on several occasions. *Withrow* v. *Larkin,* 421 U.S. 45, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975); *FTC* v. *Cement Institute,* 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1948); *NLRB* v. *Donnally Garment Co., Co.,* 330 U.S. 219, 91 L.Ed. 854, 67 S.Ct. 756 (1947); *Richardson* v. *Perales,* 402 U.S. 389, 28 L.Ed.2d 842, 91 S.Ct. 1420 (1971).

In *Withrow* v. *Larkin,* 421 U.S. 45, Mr. Justice White, writing for a unanimous court, said:

> The contention that the combination of investigative and adjudicative functions necessarily cre-

> ates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies in human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guaranty of due process is to be adequately implemented . . .
>
> It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . ." Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle. 421 U.S. at 47-48 and 52.

This Court thus found no prejudice inherent in the procedural structure in *Larkin*, and noted, in addition, that "there was no more evidence of bias or risk of bias or prejudgment than inhered in the very fact that the Board had investigated and would now adjudicate." 421 U.S. at 54.

Here there is no combination of investigative and adjudicative functions. The role of adjudicator reposes in the Supreme Court of Appeals. The role of the Committee is that of fact finder. If the Committee determines that disciplinary proceedings should be instituted, it must file a complaint with the Court together with the record of

the hearing and the Committee's report. (By-Laws of The West Virginia State Bar, ¶¶17, 18, and 19). Upon the filing of such a complaint the Court must issue an order addressed to the accused attorney to show cause why a disciplinary order should not be entered. The accused attorney may appear and file written objections to the complaint and the case is considered on the record then before the Court (By-Laws, Rule 20), unless good cause be shown for a further hearing. The hearing shall be held in such manner as the Supreme Court of Appeals may direct. (By-Laws, Rule 20).

If there was no unconstitutional prejudice inherent in the procedural structure considered in *Withrow* v. *Larkin*, where the investigative, prosecutorial and adjudicatory functions were exercised by a single agency, certainly there is no constitutional infirmity in the West Virginia procedure, where the Committee exercised no adjudicatory function and its role was limited to that of investigation and fact finding. The role of the Committee is similar to that of a master or a commissioner appointed by the Court to investigate and report facts and make recommendations. The Court retains the role of adjudicator.

The appellant contends that the Committee exhibited bias, hostility and prejudice against him. The Supreme Court of Appeals disposed of this contention saying:

> Likewise, we find no merit in the contention that the disciplinary procedure of The West Virginia State Bar denies due process by violating respondent's right to appear before an impartial, unbiased hearing tribunal. U.S. Const. Amend. XIV, §1; W.Va. Const., art. 3, §10; *North* v. *West Virginia Board of Regents*, ...W.Va....., 233 S.E.2d 411 (1977).

> Defendant does not allege that the designated subcommittee of the State Bar Ethics Committee prejudiced him by a display of actual bias or hostility. Nor does the record evidence any. Rather, he theorizes that the investigative, prosecutorial and fact finding functions of the subcommittee overlaps so as to inherently prejudice the subcommittee against any attorney brought before it.

This Court has held that it will not exert its jurisdiction merely to review a decision of a state court upon a question of fact. Once a case is otherwise before it this Court generally will not reexamine a state court's findings and conclusions of fact. *Grayson* v. *Harris,* 267 U.S. 352, 358, 69 L.Ed. 652, 45 S.Ct. 317 (1924); *Portland R. Co.* v. *Railroad Commission,* 229 U.S. 397, 412, 57 L.Ed. 1248, 33 S.Ct. 820 (1912); *Fry Roofing Co.* v. *Wood,* 344 U.S. 157, 160, 97 L.Ed. 168, 73 S.Ct. 204 (1952).

As authority for the unconstitutionality of the procedures utilized by the Committee in initiating, investigating, and presenting the complaint against him, appellant cites only *In Re Schlesinger,* 404 Pa. 584, 172 A.2d 838 (1961). Although it might be contended that the holding in *Schlesinger* more likely rests on the Pennsylvania Courts philosophical discomfort with the basis for the particular disbarment proceeding, a charge of communism, rather than on the express concern for due process, the fact remains that the due process analysis applied in *Schlesinger* has since been superseded by that enunciated by this Court in *Withrow* v. *Larkin,* 421 U.S. 35 (1975). The latter case makes clear that the statutory scheme as written and applied by The Committee on Legal Ethics in proceedings to discipline lawyers is constitutional, and does not unfairly abridge any right of the appellant to procedural due process.

V. CONCLUSION

Wherefore, appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument and the appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David A. Faber, one of the attorneys for the appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify, that on the 11th day of May, 1979, I served three copies of the foregoing Motion to Dismiss or to Affirm on the appellant by depositing the same in the United States mail box, with postage prepaid, addressed to counsel of record for the appellant, Stanley A. Preiser, 1012 Kanawha Boulevard, East, Post Office Box 2506, Charleston, West Virginia 25329, and Leo Catsonis, 205 Security Building, Charleston, West Virginia 25301. I further certify that all parties required to be served have been served. David A. Faber

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